Case No. S168066

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBIN TYLER, an individual and DIANE OLSON, an individual; CHERI SCHROEDER, an individual and CODY-RAE AFI V, an individual,

Petitioners,

v.

THE STATE OF CALIFORNIA, a political body acting in its own right and/or through EDMUND G. BROWN, in his capacity as Attorney General, and/or DEBRA BOWEN, in her capacity as Secretary of State,

Respondents.

PROPOSED INTERVENOR CAMPAIGN FOR CALIFORNIA FAMILIES' PRELIMINARY OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF

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TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Proposed Intervenor-Respondent Campaign for California Families respectfully submits this Preliminary Opposition to the Petition for Extraordinary Relief and Request for Immediate Stay.

INTRODUCTION

For the second time in eight years, more than 50 percent of California voters have confirmed that what has been true for thousands of years remains true today: Marriage is the union of one man and one woman. And, for the second time in eight years, Petitioners are seeking to thwart the will of the people by asking this Court to overturn Proposition 8. Petitioners rely upon the same arguments that this Court found unavailing in such far-reaching amendments as Proposition 13, *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 220, 583 P.2d 1281, 1284, 149 Cal.Rptr. 239, 242; the Victims' Bill of Rights, *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 260, 651 P.2d 274, 288-289, 186 Cal.Rptr. 30, 44 - 45; and the Political Reform Act of 1990,which imposed term limits on legislators and constitutional officers and budget limitations, *Legislature v. Eu* (1991) 54 Cal.3d 492, 508, 816 P.2d 1309, 1318, 286 Cal.Rptr. 283, 292. In each of those cases, this Court found that the initiatives were amendments, not revisions, and

denied opponents' requests to invalidate them.

This Court should do the same in this case. Proposition 8 does not alter the balance of power between the various branches of government, nor does it undermine or eliminate fundamental rights. Instead, Proposition 8 memorializes the centuries-old definition of a universal social institution by adding 14 words to the Constitution, "Only marriage between a man and a woman is valid or recognized in California." A majority of this Court ruled that the same language in Family Code §308.5 violated the California Constitution, but that language has not been changed by the Legislature. Administrative agencies began issuing marriage licenses to same-sex couples in June despite the fact that the language in the statute, and similar language in other statutes remains unchanged. Less than three months later, the voters again confirmed that marriage is defined as the union of one man and one woman, this time placing the language in the Constitution itself.

As a provision of the Constitution, Proposition 8 constitutes "the ultimate expression of the people's will." *In re Marriage Cases* (2008) 43 Cal.4th 757, 852. This is evidenced by the fact that Proposition 8 was approved by more than 52 percent of California's voters even after this Court's decision in the *Marriage Cases.* As such, it cannot be declared unconstitutional or cavalierly swept aside because it might be unpopular with

those who advocated and/or voted against it. That is particularly true in light of this court's consistent staunch protection of the people's right to amend the Constitution as "one of the most precious rights of our democratic process." *Associated Home Builders, etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, 135 Cal.Rptr. 41, 557 P.2d 473. That right is directly threatened by Petitioners' request for relief which seeks to invalidate the voters' exercise of their initiative power.

Petitioners urge this Court to lower the protective shield over the people's right to amend the Constitution by arguing that Proposition 8 is really a revision, not an amendment, and therefore not entitled to this Court's protection because the proposition did not originate with the Legislature. This Court's prior decisions articulating the difference between a revision and an amendment demonstrate that Petitioners' arguments are flawed. Because the prior decisions so clearly show that Proposition 8 cannot be categorized as a revision, this Court should summarily dismiss Petitioners' application for extraordinary relief.

LEGAL ARGUMENT

I. THIS COURT SHOULD SUMMARILY DENY PETITIONERS' PETITION FOR EXTRAORDINARY RELIEF.

Petitioners offer a "parade of horribles" that they claim has befallen California as a result of the passage of Proposition 8, including inscribing

discrimination into the Constitution, imposing "far-reaching changes to our Constituion," and "governmental plan" by changing the role of the judiciary as interpreter of the Constitution. These allegations echo the dire consequences that opponents to Proposition 13 claimed would occur when that comprehensive tax reform amendment was adopted and that Proposition 140 opponents claimed would occur when term limits were added to the Constitution. *See Amador Valley,* 22 Cal.3d at 220 (Proposition 13); *Eu*, 54 Cal.3d at 508 (Proposition 140). This Court determined that the allegations were unfounded in those instances and should make the same determination here.

In addition, as this Court stated in *Amador Valley, Eu, Brosnahan* and *Associated Home Builders*, the will of the people expressed through the initiative process must be zealously protected to avoid diminution of the right not granted to, but reserved by, the people. Granting Petitioners' requests in this case would contravene the Court's role as protector of the democratic process. It is overturning Proposition 8, not validating Proposition 8, that would wreak havoc on the democratic process.

A. There Is No Merit To Petitioners' Claim That Proposition 8 Is A Revision Instead Of An Amendment.

Petitioners claim that Proposition 8 is "tantamount to a substantial

revision" of the Constitution. Petitioners cite *Raven v. Deukmejian* (1990) 52 Cal3d 336, 351, 276 Cal.Rptr.326, 335,in support of their proposition. However, a review of the *Raven* case in the contents of *Amador Valley*, *Brosnahan* and *Eu* demonstrates that *Raven* is wholly inapplicable to Proposition 8, and that under this Court's precedent in *Amador Valley*, *Brosnahan* and *Eu* Proposition 8 cannot be categorized as a "revision" instead of an amendment.

In *Amador Valley*, a group of governmental agencies sought to overturn Proposition 13, also known as the Jarvis-Gann Property Tax Initiative. As Petitioners do here, the petitioners in *Amador Valley* claimed that Proposition 13 "represents such a drastic and far-reaching change in the nature and operation of our governmental structure that it must be considered a 'revision' of the state Constitution rather than a mere 'amendment' thereof."*Amador Valley*, 22 Cal.3d at 221. Proposition 13 contained six subsections, including one that limited the tax rate on real property, one that changed the definition of assessed value of property, one that imposed a 2/3s vote of the Legislature to raise taxes and one that imposed a 2/3s vote of municipal bodies to raise local taxes. *Id.* at 220. This Court applied the quantitative and qualitative analysis first employed in *Livermore v. Waite* (1894) 102 Cal. 113, and found that Proposition 13 qualified as an amendment in both respects. Quantitatively,

Proposition 13 contained approximately 400 words and was limited to the single subject of taxation. *Id.* at 224. By contrast, the initiative measure struck down as a revision in *McFadden v. Jordan,* (1948) 32 Cal. 2d 330, contained 21,000 words and covered numerous subjects. *Id.* Qualitatively, Proposition 13 would not change the basic governmental plan, so as to eliminate home rule and replace republican government with democratic government, as alleged by petitioners. *Id.* at 227. Contrary to petitioners' allegations, state and local governments would continue to function through the traditional system of elected representation. *Id.* "Other than in the limited area of taxation, the authority of local government to enact appropriate laws and regulations remains wholly unimpaired." *Id.*

> In summary, we believe that it is apparent that article XIII A will result in various substantial changes in the operation of the former system of taxation. Yet, unlike the alterations effected by the *McFadden* initiative discussed above, the article XIII A changes operate functionally within a relatively narrow range to accomplish a new system of taxation which may provide substantial tax relief for our citizens. We decline to hold that such a limited purpose cannot be achieved directly by the people through the initiative process.

Id. at 228.

This Court applied the same quantitative/qualitative analysis to the Victims' Bill of Rights and similarly found that it was an amendment, not a revision. *Brosnahan*, 32 Cal.3d at 261.Quantitatively, it only repealed one

constitutional provision and added one in its place, which was not extensive enough to constitute a revision. *Id.* Qualitatively, the measure, which limited plea bargaining and created a right to safe schools, created substantial changes in the criminal justice system, but "even in combination these changes fall considerably short of constituting 'such far reaching changes in the nature of our basic governmental plan as to amount to a revision.'" *Id.* at 260 (citing *Amador Valley*, 22 Cal.3d at 223). This court rejected the petitioners' claims that the measure would result in the inability of the judiciary to perform its constitutional duty to decide cases, particularly civil cases; and the abridgement of the constitutional right to public education. *Id* at 261.

In *Eu*, this Court distinguished Proposition 140, which imposed term limits and budget restrictions, from Proposition 115 section 3, which would have prevented state courts from affording greater rights to criminal defendants than are provided under the United States Constitution, and which this Court struck down as a "revision" in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 343. The *Eu* court found that unlike Proposition 115(3), Proposition 140 did not effect a fundamental change in the basic plan of California government. *Eu*, 54 Cal.3d at 508-509. The section of Proposition 115 struck down in *Raven* would have subordinated the constitutional role assumed by the judiciary. *Eu*, 54 Cal.3d at 508. By contrast, the term limits and

budget restraints enacted by Proposition 140 left the basic and fundamental structure of the Legislature as a representative branch of government substantially unchanged. *Id.* Term and budgetary limitations might affect who participates in the legislative process, but do not alter the underlying process. *Id.* Therefore Proposition 140 was not a "revision." *Id.*

Likewise, Proposition 8, which adds a 14-word definition to the text of the Constitution, does not effect a quantitative or qualitative change sufficient to constitute a revision. Placing the words "only marriage between a man and a woman is valid or recognized in California" does nothing to affect the overall structure of state government. The various roles of the legislative, executive and judicial branches remain intact, and none of their responsibilities under the Constitution, such as taxation or plea bargaining, are addressed by the 14-word definition of marriage. Proposition 8 addresses only one subject – marriage – much more narrowly than Proposition 13 addressed taxation. As the petitioners did in *Amador Valley* and *Eu,* Petitioners here claim that Proposition 8 will wreak havoc on the rule of law. Petitioners claim that defining marriage as the union of one man and one woman will somehow deprive the courts of the power to protect minorities. Since the amendment is silent as to the judiciary, or any other branch of government, there cannot be any effect on the role and constitutional responsibilities of the respective

branches.

Petitioners also claim that Proposition 8 turns equal protection "on its head."Again, since the amendment merely sets forth a long-established definition of a universal social institution, there is no diminution in fundamental rights that are similarly long-established. On May 15, 2008 this Court found that a statute defining marriage as the union of one man and one woman did not comport with the Constitution as it then existed. Since then, the people of California have said that the Constitution includes that definition of marriage. That means that defining marriage as the union of one man and one woman now does comport with the Constitution as enacted by the people.

As was true with Proposition 13, Proposition 140 and the Victims' Bill of Rights, Proposition 8 is a valid constitutional amendment enacted by the people of California under the initiative power. As this Court did with regard to Proposition 13, it must "decline to hold that such a limited purpose cannot be achieved directly by the people through the initiative process." *Amador Valley*, 22 Cal.3d at 228. Petitioners' petition must be summarily dismissed.

B. Petitioners Seek To Undermine The People's Right To Amend the Constitution By Initiative.

This Court should also summarily dismiss Petitioners' Petition to protect the people's right to amend the Constitution by initiative. Throughout their petition Petitioners exhibit disdain for the voters' exercise of their right

to amend the constitution, calling it "popular whim" (Petition at p. 11). Petitioners ask this court to disrespect the people's reserved power to amend the Constitution by initiative by overturning Proposition 8.

This Court has consistently said that it cannot do what Petitioners ask. "It is a fundamental precept of our law that, although the legislative power under our constitutional framework is firmly vested in the Legislature, 'the people reserve to themselves the powers of initiative and referendum.' (Cal.Const., art. IV, s 1). It follows from this that, '(t)he power of initiative must be liberally construed . . . to promote the democratic process.'" *Amador Valley*, 22 Cal.3d at 209.

> Declaring it 'the duty of the court to jealously guard this right of the people'[citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' [Citations.].

Associated Home Builders, 18 Cal.3d at 591. Citing that quotation, the *Brosnahan* court said, "Consistent with our firmly established precedent, we have jealously guarded this precious right, giving the initiative's terms a liberal construction, and resolving reasonable doubts in favor of the people's exercise of their reserved power." *Brosnahan*, 32 Cal.3d at 262.

> As succinctly and graphically expressed a number of years ago in a study of the California procedure, ". . . the initiative is in essence a legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end. Virtually every type of interest-group has on occasion used this instrument. It is deficient as a means of legislation in that it permits very little balancing of interests or compromise, but it was designed primarily for use in situations where the ordinary machinery of legislation had utterly failed in this respect. It has served, with varying degrees of efficacy, as a vehicle for the advocacy of action ultimately undertaken by the representative body." (Key & Crouch, The Initiative and the Referendum in Cal. (1939) p. 485).

Amador Valley, 22 Cal.3d at 228-229. "The foregoing language, written almost 40 years ago, seems remarkably prophetic given the apparent historic origins of article XIII A." *Id.* at 229. "[W]e find nothing in the Constitution's revision and amendment provisions (art. XVIII) which would prevent the people of this state from exercising their will in the manner herein accomplished." *Id.* "Indeed, if the foregoing description of the initiative as a 'legislative battering ram' is accurate it would seem anomalous to insist, as petitioners in effect do, that the sovereign people cannot themselves act directly to adopt tax relief measures of this kind, but instead must defer to the Legislature, their own representatives." *Id.*

The words quoted by this Court in *Amador Valley* are equally prophetic in light of the historical origin of Proposition 8. The text of Proposition 8 was

initially enacted by initiative on March 7, 2000 as Proposition 22, and codified as Family Code §308.5. On October 14, 2001, then-Governor Gray Davis signed AB 25, which granted 15 specific rights previously available only to married couples to domestic partners. On September 19, 2003, Governor Davis signed AB 205, which extended to domestic partners all the rights, benefits and obligations available under state law to spouses. The Second District Court of Appeal rejected a challenge to the scope of AB 25 and AB 205, *Knight v. Schwarzenegger* (2005) 128 Cal.App. 4th 14.

Meanwhile, the cases which became coordinated as *In re Marriage Cases* were filed in 2004, challenging the constitutionality of Family Code §308.5. On September 27, 2007, as that case was proceeding through the Court of Appeal and this Court, the Legislature approved AB 43, which would have amended Family Code §300 to read: "Marriage is a personal relation arising out of a civil contract between two persons, to which the consent of the parties capable of making that contract is necessary." (http://leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_bill_20070927_enrolled.html. (Last visited November 14, 2008)). The bill was vetoed by Governor Schwarzenegger, but further illustrated that the Legislature was not disposed to memorializing the definition of marriage as one man and one woman either in the Family Code or the Constitution.

In the midst of the court challenge to Proposition 22 and the Legislature's efforts to change the definition of marriage what became Proposition 8 was circulated among California voters and placed on the November 2008 ballot. When more than 52 percent of voters approved Proposition 8, they were using the initiative power in the very way it was intended – "for use in situations where the ordinary machinery of legislation had utterly failed in this respect." *Amador Valley*, 22 Cal.3d at 229. As was true in *Amador Valley*, it would seem anomalous to insist, as Petitioners in effect do, that the people cannot act directly to memorialize the definition of marriage, but must defer to the Legislature, which has refused to implement the will of the people in this regard. That is precisely the anomalous result that would occur should this Court grant the relief requested by Plaintiffs.

Consequently, Petitioners' request for relief should be summarily denied.

II. PETITIONERS ARE NOT ENTITLED TO A STAY

Petitioners ask for an "immediate stay," but do not cite to a particular statutory basis for the request. Petitioners are presumably asking for a stay under Code of Civil Procedure §923, similar to the stay sought by Petitioner in *Strauss v. Horton*, Supreme Court Case No. S 168047. As described more fully above, overturning Proposition 8, or even halting its effectiveness for a

period of time, will significantly impair the right the people have reserved to themselves to amend the Constitution by initiative. Moreover, staying the effectiveness of Proposition 8 will continue the confusion regarding the validity of marriage licenses issued to same-sex couples between June and November 5, 2008. The validity of those approximately 18,000 licenses is in question following the passage of Proposition 8. Permitting additional same-sex couples to obtain licenses will only increase the confusion. In fact, staying the effectiveness of Proposition 8 will actually harm the very people Petitioners claim that they are seeking to benefit – same-sex couples – as those couples will be issued marriage licenses of questionable validity, placing them in a legal limbo of sorts.

Furthermore, it is doubtful that Section 923 can even be applied to this situation. The cases relied upon by Petitioners, *Rosenfeld v. Miller* (1932) 216 Cal. 560, *Segarini v. Bargagliotti* (1924) 193 Cal. 538 and *Cal. Table Grape Comm'n v. Dispoto* (1971) 14 Cal.App. 3d 314, all involved personal money judgments. As the Court of Appeal said in *Solomon v. Solomon* (1952) 110 Cal.App.2d 660, 662, 243 P.2d 556, 557: "It is well settled that the power of an appellate court on supersedeas can be exercised only with respect to a judgment or order then before the court on appeal." The *Solomon* court based that statement upon this Court's rulings in *In re Imperial Water Company No.*

3, (1926) 199 Cal. 556, 557, 250 P. 394, 395("It has been repeatedly held by this court that a supersedeas will issue only to restrain the court below or its officers from proceeding to enforce a judgment pending appeal and that such writ is limited to restraining any action under the authority of the court upon the judgment appealed from.") and *McCann v. Union Bank & Trust Co.,* (1935) 4 Cal.2d 24, 25, 47 P.2d 283, 284, ("The operation of that writ is limited to the issuance thereof by an appellate court in aid of its appellate jurisdiction to stay proceedings on the judgment or order from which the appeal is taken." (citing *Rosenfeld*, 216 Cal. 560; *Dulin v. Pacific Wood & Coal Co.*, (1893) 98 Cal. 304, 33 P. 123.)).

This case involves a citizen-enacted constitutional amendment, not a money judgment or court order. There are no cases cited by Petitioners, nor none found in this Court's prior rulings, that support application of Section 923 to citizen-enacted constitutional amendments. Furthermore, since this Court has consistently held that the right of the people to amend the Constitution by initiative the right is not to "improperly annulled," *Associated Home Builders,* 18 Cal.3d at 591, it would be improper to apply Section 923 to Proposition 8 in the way urged by Petitioners.

Consequently, this Court should summarily deny Petitioners' request for a stay under Code of Civil Procedure §923.

CONCLUSION

For the foregoing reasons, the Court should summarily dismiss the Petitioners' Request for Extraordinary Relief.

Respectfully submitted this 17th day of November, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Preliminary Opposition has been prepared using proportionately double-spaced 13 point Times New Roman font. According to the "word count" feature of WordPerfect, which was used to prepare this document, the total number of words including footnotes but excluding the Table of Contents and Table of Authorities, is 4,188 words.

I declare under penalty of perjury under the laws of the State of California that this statement is true and correct.

Executed on November 17, 2008 at Lynchburg, Virginia.

Mary E. McAlister

DECLARATION OF SERVICE BY FACSIMILE

I, Mary E. McAlister, declare:

I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the above-entitled cause. My business address is 100 Mountain View Road, Suite 2775, Lynchburg, VA 24502.

I served the Preliminary Opposition of Proposed Intervenor by transmitting a copy of the document via facsimile to the attorneys listed below:

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Dated: November 17, 2008.

Mary E. McAlister